pounded: that there must be an intent to remain merely an unlimited time,[14] or an indefinite time,[15] or even a definite period if reasonably long.[16] A number of courts have defined the intent necessary no more minutely than as the intent to found a new home.[17] This test as matter of law reconciles all the others; for under it the varying criteria of permanence, indefiniteness, and the like, are nothing more than differences of opinion as to what in fact constitutes the intent to found a home.[18]

A recent case decides that an American residing permanently in a Chinese treaty port obtains a Chinese domicile. *Mather* v. *Cunningham*, 3 Am. Journ. Int. L. 752 (Me., Sup. Ct., Apr. 15, 1909). An English case cited in the opinion holds on similar facts against a change of domicile, on the grounds that no Christian can desire to become a Chinese, or subject himself to Chinese laws; and that the existence of extraterritorial courts is the best proof of these inferences.[19] The inferences, indeed, require no proof; but under general principles they seem quite irrelevant. As has been said, the present English law requires for change of domicile intent neither to acquire a new nationality nor a new status. Nor does the situation demand a special principle. For on any theory Europeans in a treaty port are tried under Occidental systems in consular courts; so that there is here not even the ordinary objection to a change of legal home, that it involves an abandonment of home law. The Maine court is accordingly to be commended for declining to recognize in a complicated topic a new and unnecessary complication.

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RIGHT OF A COMMON CARRIER TO REFUSE SERVICE OWING TO THE NATURE OF THE GOODS. — The liability of a common carrier is twofold. Owing to the public character of his employment he is under a duty to serve all, without discrimination, to the extent of his profession; and because he has assumed a profession which in early times was hazardous, he is liable as insurer of objects carried,[1] except in the case of passengers, animals, and articles subject to inherent vices.[2] The courts speak of the latter ob-

[14] Mitchell *v.* United States, 21 Wall. 350; Guier *v.* O'Daniel, 1 Binn. (Pa.) 349 n.

[15] Venable *v.* Paulding, 19 Minn. 488. In Attorney-General *v.* Pottinger, 6 H. & N. 733, Bramwell, B., accepted as the test for change of domicile, the intent to remain an indefinite time. But this was not followed in later English decisions. Very similar to the intent to remain an indefinite time is the intent to remain indefinitely, which is regarded as essential in Concord *v.* Rumney, 45 N. H. 423.

[16] Gilman *v.* Gilman, 52 Me. 165.

[17] White *v.* Brown, 1 Wall. Jr. C. Ct. 217.

[18] Where different expressions are so common, it is hard to speak of the weight of authority. But it is conceived that the courts in most of the states will usually find a change of domicile in the case of any one intending to set up a new home. This tendency is more pronounced as to changes of municipality than of state. Wilbraham *v.* Ludlow, 99 Mass. 587.

[19] *In re* Tootal's Trusts, 23 Ch. Div. 532.

[1] Citizens Bank *v.* Nantucket Boat Co., 2 Story (Mass.) 16, 33; Johnson *v.* Midland Ry. Co., 4 Exch. 367; Wilsons *v.* Hamilton, 4 Oh. 722. See also 11 HARV. L. REV. 158, 164.

[2] Clark *v.* McDonald, 4 McCord (S. C.) 223; Blower *v.* Great Western Ry. Co., L. R. 7 C. P. 655; Clarke *v.* Ry. Co., 14 N. Y. 570. It is often said that carriers of live-stock are insurers not liable for injuries due to the propensities of the animals. Chi. & Louisville Ry. Co. *v.* Woodward, 164 Ind. 360; Lewis *v.* Pa. Ry. Co., 70 N. J. L. 132.

ligation as the "liability of a common carrier"; but the truth is that whether he is responsible as an insurer or not, a carrier is a common carrier if his undertaking is to serve all comers. He is so by reason of his profession and not because of his responsibility.[3] In analyzing the cases it is important to notice to which "liability as common carrier" the courts hold the carrier. Decisions which declare a common carrier liable as insurer of certain goods involve the determination of his duty to carry such goods for all, because of his public employment; but the converse proposition is not necessarily true.[4]

Where a carrier's charter is permissive, his duty to carry is confined to such property as he expressly or impliedly professes to transport.[5] His undertaking may be to carry merchandise, passengers, and money; or it may be limited to one or more of these classes, in which case he cannot be compelled to carry the others.[6] Thus an express company must carry money but need not carry live-stock or other unwieldy goods;[7] and a carter need accept only goods adapted to his facilities which, of course, limit his profession.[8] No ordinary carrier need transport dangerous articles or goods of a fragile nature; for public policy, which justifies the regulation of carriers, does not sanction the imposition of undue risk.[9] On the other hand it is settled that a railroad must carry perishable goods if properly packed[10] and must accept live-stock for carriage.[11] It is doubtful whether the transportation of ordinary merchandise should commit a railroad to the carriage of animals, which fall more logically under the passenger class. The later decisions, however, reflect a tendency to enlarge the duties of railroads on the ground that they are created for the purpose of carrying all kinds of property which the common law permitted to be carried in any mode.[12] But by professing to carry one class of goods a carrier should not fear being compelled to carry any other.

In undertaking to carry a particular class of goods a common carrier must accept all goods not fundamentally different in character. The earlier view, which still prevails in England, was that the right to discriminate within a class is determined by the impression given the public.[13] In this country, however, the logic of public profession is not carried so far. Accordingly, a carrier of valuables must carry money, and a truckman professing to carry heavy things must carry machinery.[14] But in a recent

[3] Ry. Co. *v.* Lockwood, 17 Wall. 357.

[4] *Cf.* Pittsburgh & St. Louis Ry. Co. *v.* Morton, 61 Ind. 539.

[5] Citizens Bank *v.* Nantucket Boat Co., *supra.*

[6] Citizens Bank *v.* Nantucket Boat Co., 5 Fed. Cas. 2730; Pfister *v.* Central Pac. Ry. Co., 70 Cal. 169; Pender *v.* Robbins, 51 N. C. 207.

[7] Platt *v.* Lecocq, 158 Fed. 723; U. S. Express Co. *v.* Burke, 94 Ill. App. 420.

[8] Tunnel *v.* Pettijohn, 2 Harr. (Del.) 48.

[9] Walker *v.* Babcock, 16 Hun 313; California Powder Works *v.* Atlantic & Pac. Ry. Co., 113 Cal. 329; see also Alston *v.* Herring, 11 Exch. 822.

[10] Baker *v.* B. & M. Ry. Co., 74 N. H. 100. A carrier may make reasonable regulations as to packing. Elgin Ry. Co. *v.* Machine Co., 98 Ill. App. 331; Boyd *v.* Moses, 7 Wall. 316.

[11] Kansas Pacific Ry. Co. *v.* Nichols, 9 Kan. 235; Cooper *v.* R. & G. Ry. Co., 110 Ga. 659; *contra*, Mich. Ry. Co. *v.* McDonough, 21 Mich. 165. But a carrier need not carry wild animals. See Coup *v.* Wabash Ry. Co., 56 Mich. 111.

[12] Baker *v.* B. & M. Ry. Co., *supra;* Kansas Pacific Ry. Co. *v.* Nichols, *supra.*

[13] Johnson *v.* Midland Ry. Co., *supra;* Leonard *v.* Am. Express Co., 26 Upp. Can. Q. R. 533.

[14] Iron Works *v.* Hurlbut, 36 N. Y. Supp. 808; News Publishing Co. *v.* Southern Ry. Co., 110 Tenn. 684.

decision it was held that an express company undertaking to carry merchandise C. O. D. may nevertheless refuse to carry liquor in that way. *Burk* v. *Platt*, 172 Fed. 777 (Circ. Ct., N. D., W. Va.). This, however, does not conflict with the general American doctrine. A common carrier has a common-law right to insist on prepayment of charges; and it makes no difference that he extends credit to certain shippers.[15] It might be argued that express companies in professing to carry all merchandise C. O. D. have waived their common-law right. But public policy hardly justifies the imposition of this additional burden, and it is safe to say that a carrier may discriminate, as to C. O. D. shipments, not only between commodities but also between persons.

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CREATION OF JOINT TENANCIES. — In joint tenancy each co-owner is possessed of the whole subject to the others' interests; tenants in common hold distinct, although undivided, parts. The great practical difference between the two forms of collective ownership is that on the death of a joint tenant the survivors hold the *res* free of the interest of the deceased; while on the death of a tenant in common the property passes to his representatives just as would any other property. Of these forms, tenancy in common is the more in accord with ancient custom. And it seems not unlikely that down to the time of Bracton [1] a conveyance to several, in the absence of special facts, created a tenancy in common. Such an interest in real property imposed upon each tenant the incidents of tenure as to his share; and the courts came to feel that in construing limitations as tenancies in common they were not benefiting the holders of the property.[2] The general rule in favor of such construction accordingly fell; and as it was at first replaced by no other, the judges for a time probably applied no definite principle to the cases as they arose.[3] But when Littleton wrote, the new general rule had developed, that a conveyance to two or more created a joint tenancy unless the instrument itself showed an intent that the enjoyment be several.[4]

The substantial disappearance of the incidents of tenure took from joint tenancy its claim to the favor of the judges. And although the rule of Littleton held its own alike for real and personal estates and for choses in action, the courts became increasingly liberal in finding words of severance.[5] This liberality was somewhat more marked in equity than at law,[6] and perhaps also more marked, both at law and in equity, as to convey-

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[15] Danciger *v.* Wells Fargo, 154 Fed. 379; Southern Indiana Express Co. *v.* U. S. Express Co., 92 Fed. 1022.

[1] Lib. 5, 375 a.

[2] 2 Bl. Comm. 193.

[3] Fleta's apparent inconsistency with himself (lib. 3, cap. 4, § 2, and lib. 3, cap. 4, § 7) and with Britton (Bk. I, Ch. IV, 6) is probably to be explained on the theory that at the end of the thirteenth century the law on the point was unsettled. See discussions of these early authorities in Wythe (Va.) 377 n. (58) and in 13 Sol. J. 885.

[4] Co. Litt. § 283.

[5] In the notes to Morley *v.* Bird, 3 Ves. 628, in Tudor, Lead. Cas. in Real Prop., 4 ed., 271–277, and 281–286, is an exhaustive discussion of the effect of particular phrases in creating joint tenancies and tenancies in common.

[6] Fleming *v.* Fleming, 5 Ir. Ch. 129.